KONG HONG MING

v.

THE ELECTION COMMISSION & ORS

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
CLEMENT SKINNER J
[ELECTION PETITION NO: K-26-01-99]
25 NOVEMBER 2000

ELECTION: *Petition - Transfer of election judge - Petition partly heard - Whether fresh hearing be convened - Discretion of new judge*

ELECTION: *Petition - Interim or interlocutory order of election judge - Whether can be re-examined by new judge - Finality of order*

ELECTION: *Petition - Transfer of election judge - Petition partly heard - Whether fresh preliminary objection allowed to be raised*

The judge who was hearing the election petition was transferred to another state. Prior to his transfer, he had heard the petitioner's 14 witnesses and the petitioner had closed his case. The respondents had yet to open their case or call any witnesses.

The current judge has to decide the following issues: (i) whether he should try this petition *de novo* or continue it from where the previous judge left it; (ii) if it is to be heard *de novo*, whether the respondents are to be allowed to re-open and re-submit on their preliminary objections and motions which had already been dismissed by the previous judge; and (iii) whether the 1st, 2nd and 3rd respondents may raise a new or fresh preliminary objection on whether the Election Commission and its officers are proper parties to this petition.

Held:

[1] It is quite clear from a reading of both s. 18(2) of the Courts of Judicature Act 1964 and r. 20 of the Election Petition Rules 1954 that the selection of the actual manner in which the new judge should proceed is left to his discretion. But that discretion which is vested in the new judge is a discretion to be exercised, not according to his whims, but judiciously so as to achieve a just result in the circumstances of the case before him.

[2] In this case factors calling for discretion to be exercised in favor of a *de novo* hearing of this petition far outweigh those calling for the case to be continued from where the previous judge left it. It is therefore ordered that the election petition be heard *de novo* by recalling the petitioner's witnesses and recommencing this trial.

[3] It would run counter to that philosophy and render negatory the statutory provisions pronouncing the finality of an election judge's decision if the respondents were allowed to re-open the issues upon which a decision had already been made by the previous judge.

[4] In civil proceedings, the court may at any stage of the proceedings order that a party to the proceedings be removed or that a new party be added. There is no good reason why that same power cannot be exercised by an election judge. Hence, the respondents are at liberty to raise a fresh preliminary objection if they wish to.

[Order accordingly.]

Case(s) referred to:

Arnold & Ors v. National Westminster Bank plc [1990] 1 All ER 529 ***(refd)***

Badiaddin Mohd Mahidin & Anor v. Arab-Malaysian Finance Bhd [1998] 2 CLJ 75 ***(refd)***

Datuk Joseph Pairin Kitingan v. Datuk Harris Salleh & Ors (unreported) ***(refd)***

Devan Nair v. Yong Kuan Teik [1967] 1 MLJ 261 ***(refd)***

Dr Lee Chong Meng v. Returning Officer & Ors (No 1) [2000] 3 CLJ 519 ***(refd)***

Tengku Abdullah v. Ali Amberan [1971] 1 MLJ 25 ***(refd)***

Tengku Nawawi Tengku Abd Kadir v. Lokeman Musa & Ors [1996] 1 CLJ 551 ***(refd)***

Wee Choo Keong v. Lee Chong Meng & Anor [1996] 3 CLJ 508 ***(refd)***

Wong Phin Chung v. The Election Commission (unreported) ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, ss. 18(2)(a)

Election (Conduct of Elections) Regulations 1981, reg. 14

Election Offences Act 1954, ss. 33(1), (4), 36

Election Petition Rules 1954, rr. 15, 20

Rules of the High Court 1980, O. 35 r. 11

For the petitioner - Mary Lee (Raymond Szetu); M/s Szetu Lee & Assoc

For the 1st, 2nd, 3rd respondents - Bazain Idris (Ahmad Kamil Sahid)

For the 4th respondent - Anthony Roderic Fernandez (Richard Christopher Barnes); M/s Shelley Yap Leong Tseu, Chong Chia & Co

Reported by Yow Ting Fong

JUDGMENT

Clement Skinner J:

The learned judge who was hearing this election petition was transferred from Sarawak to Kelantan on 1 July 2000. By that date, he had heard 14 of the petitioner's witnesses whereafter the petitioner had closed his case. The respondents had yet to open their case or call any witnesses.

Before the hearing of this petition commenced, the respondents had raised several preliminary objections as well as filed notices of motion to have this petition dismissed. Thus, the 1st, 2nd and 3rd respondents raised the following preliminary objections to the petition:

1. that the names of persons appearing in an electoral roll cannot be challenged by way of an election petition;
2. that a substantial number of the complaints set out in the petition do not implicate the 1st, 2nd and 3rd respondents in any way;
3. that the petition was not served on them in accordance with r. 15 of the Election Petition Rules 1954 (this objection was however abandoned at the hearing).

In their motion, the 1st, 2nd and 3rd respondents complained that the allegations made against the 3rd respondent on the postal ballots cast during the election were without any basis.

The 4th respondent filed a motion to set aside the petition as well. He complained that:

1. the petition had failed to provide sufficient particulars and details;
2. that the petitioner was attempting to challenge the electoral rolls by way of an election petition when an election judge has no jurisdiction to entertain such a complaint;
3. that the petition had not been served on the 4th respondent in accordance with r. 15 of the Election Petition Rules.

After hearing arguments on the above objections, the learned judge dismissed them all and then proceeded to try the petition.

But as I had said, the learned judge was transferred. On 19 July 2000, the Chief Judge of Sabah and Sarawak, pursuant to the powers vested in him by s. 33(1) of the Election Offences Act 1954, nominated me as the judge to try this election petition. The petitioner being unhappy that a new

judge was to take over the hearing of this petition, made representation to the Chief Judge of Sabah and Sarawak, for the previous judge to continue to hear this petition but was unsuccessful in his endeavour.

When this petition came on for hearing before me, counsel for the petitioner requested that I continue to hear this petition from where the previous judge had left it. In effect, he was requesting that I should act on the evidence already recorded by the previous judge. His reasons in urging me to do so were: firstly, it would save costs. If this petition were heard *de novo*, all 14 of the petitioner's witnesses would need to be recalled. Secondly, a rehearing would lead to delay. Thirdly, if this petition were heard *de novo*, it would give the respondents a 'second bite at the cherry' so to speak because they have already heard the evidence of the petitioner's witnesses and subjected them to cross examination. Fourthly, there was a real danger of the petitioner's witnesses being pressurised to change their evidence.

With regard to the preliminary objections and motions which had been dismissed by the previous judge, counsel for the petitioner submitted that the respondents should not be allowed to re-open the issues and re-submit on those preliminary objections and motions. According to counsel, the doctrine of *res judicata* would operate to prevent the respondents from doing so.

Learned counsel representing the 1st, 2nd and 3rd respondents as well as counsel for the 4th respondent take a different view. It is their submission that I should not only order that this petition be tried *de novo* but that I should also rehear the preliminary objections and motions which had been dismissed by the previous judge.

The respondents say that I should hear this petition *de novo* because it is a petition which alleges general bribery, corruption, undue influence and personation. As such, counsel for the 4th respondent contended that the outcome of this petition will depend to a large extent on whether I believe the evidence given by the petitioner's witnesses or that given by the respondents' witnesses; but to be able to do so, I must first have seen and heard them giving their evidence, which, if I were now to order the trial to proceed from where it was last left by the previous judge, I would not be able to do. Other reasons given by the respondents for a trial *de novo* were: that I may not be able to fully understand the notes taken by the previous judge; that there were voluminous documents tendered as exhibits, many of which refer to each other: without hearing the explanation on how these documents are connected, I would not fully appreciate their

significance; that the stand now taken by the petitioner is inconsistent with the reasons given by him earlier for wanting the previous judge brought back to complete this trial, namely, that another judge hearing this petition would not be able to understand the previous judge's notes or have the advantage of seeing and hearing the witnesses already called.

With reference to the preliminary objections and motions which had been dismissed by the previous judge, the respondents say they should be reheard because the justice of the case requires it. It is the contention of the respondents that there are recognised exceptions to the doctrine of *res judicata*. One such exception is that if special circumstances can be shown why the doctrine would not apply, it will not be applied. As authority for the above proposition, counsel for the respondents referred to the decision of the English Court of Appeal in the case of *Arnold & Ors. v. National Westminster Bank plc* [1990] 1 All ER 529. That case decides that where an issue which has already been decided between the parties has, by virtue of a new development in the law, been shown to be wrongly decided either in fact or law the court would regard that new development as a special circumstance, thereby allowing the issue to be reopened in subsequent proceedings between the parties if that was necessary to work justice between them.

Applying the ratio of *Arnold*'s case to the facts of our case, counsel for the respondents submitted that there has been a new development in the law regarding election petitions; it is this: the Election Commission and its officers are not proper parties to an election petition. This new development is the result of the decision of Mr. Justice Augustine Paul in the case of *Dr. Lee Chong Meng v. Returning Officer & Ors. (No. 1)* [2000] 3 CLJ 519. By virtue of this new development, the respondents say they should be allowed to reopen the issues decided by the previous judge.

It was further contended by counsel for the respondents that the previous judge had made a decision on a matter over which he had no jurisdiction or alternatively that his decision was contrary to a provision of law. In those circumstances, submitted counsel, his decision may be departed from since the doctrine of *res judicata* would have no application in those circumstances. As authority for this proposition, counsel for the respondents referred to the decision in *Badiaddin bin Mohd. Mahidin & Anor. v. Arab-Malaysian Finance Bhd.* [1998] 2 CLJ 75. The decision of the previous judge which the respondents complain of as being made without jurisdiction or against a provision of law, is that relating to the petitioner's complaints regarding the electoral rolls which the respondents say cannot be raised in an election petition.

It was lastly contended on behalf of the respondents that I should allow the respondents to be reheard on their preliminary objections and motions because the decision of one election judge cannot bind another election judge, as both exercise concurrent jurisdiction.

During submissions, in addition to raising the above matters, counsel for the 1st, 2nd and 3rd respondents gave notice that whatever may be my decision on whether or not the respondents are to be allowed to reopen and re-argue their preliminary objections and motions, the 1st, 2nd and 3rd respondents wished to be allowed to raise as a new preliminary objection, the question of whether the Election Commission and its officers are proper parties to this election petition. According to counsel, the doctrine of *res judicata* would not operate to prevent them from raising this issue as it was not raised before the previous judge.

As I see it, the following issues arise for determination:

(1) Whether I should try this petition *'de novo'* or continue it from where the previous judge left it.

(2) If it is to be heard *'de novo'*, whether the respondents are to be allowed to reopen and re-submit on their preliminary objections and motions which had already been dismissed by the previous judge.

(3) Whether the 1st, 2nd and 3rd respondents may raise a new or fresh preliminary objection on whether the Election Commission and its officers are proper parties to this petition.

I now consider each of these issues.

(1) Whether This Petition Is To Be Heard *'De Novo'*?

The statutory provisions concerning the continuation of a trial by another judge where the judge who began the trial cannot complete it is found in s. 18 of the Courts of Judicature Act 1964 (hereafter 'the CJA'), and because this is an election petition, r. 20 of the Election Petition Rules 1954.

Section 18(2) of the CJA reads:

> (2) Whenever any Judge, after having heard and recorded the whole or any part of the evidence in a proceeding, is unable through death, illness or other cause to conclude the proceeding, another Judge may:
>
> (a) continue with the proceeding from the stage at which the previous Judge left it and:

(i) act on the evidence already recorded by the previous Judge; or

(ii) act on the evidence partly recorded by the previous Judge and partly by himself; or

(b) resummon the witnesses and recommence the proceeding.

Rule 20 of the Election Petition Rules reads in its material parts:

> 20. ... and in the event of the Judge who begins the trial being unable by illness or otherwise, it may be recommenced and concluded by another Judge.

It will be seen from a reading of s. 18(2) CJA that the new judge is left with a choice as to how he should proceed to bring the trial to a conclusion. Rule 20 of the Election Petition Rules is expressed in more general terms but clearly leaves the new judge with a choice of recommencing the trial. But it is quite clear from a reading of both s. 18(2) and r. 20 that the selection of the actual manner in which he should proceed is left to the discretion of the new judge, the operative words in s. 18(2) CJA being "another judge may –", and the operative words in r. 20 being "it may be recommenced ..." But that discretion which is vested in the new judge is a discretion to be exercised, not according to his whims, but judiciously so as to achieve a just result in the circumstances of the case before him.

In deciding which way I should exercise the discretion vested in me, I take into account the following matters:

(a) If this trial is to be heard *de novo*, it will cause the petitioner to suffer a certain amount of prejudice and hardship, in that, he will incur further costs and expenses with the resummoning of 14 witnesses; that further delay will inevitably result to these proceedings; that the respondents are given a second bite at the cherry in that the petitioner's evidence is fully known to the respondents who have had a chance to test it by cross examination and will be afforded another opportunity to do so; and that there is a danger of the plaintiff's witnesses being pressurised to change their testimony. As against the prejudice which the petitioner says he will suffer, I take into account the fact that if there is a trial *de novo*, the respondents too will have to incur extra costs, although to a lesser extent since their witnesses have yet to be called. With regard to delay, all the respondents also suffer by the delay since the uncertainty caused by this petition hangs over all their heads, and, so far as the 4th respondent is concerned, since he is the sitting member for Kudat in the State Legislative Assembly and also holds public office as a State Minister, the uncertainty

over the legitimacy of his positions is exercabated by any delay in the disposal of this petition. As regards the respondents being afforded a second bite at the cherry, I take into account that the petitioner too is afforded a second opportunity, so to speak, of improving and 'tightening up' on the evidence already adduced, having had an opportunity of reviewing it. I also agree with the submission of Mr. Roderick Fernandez of counsel for the 4th respondent that a truthful witness should not fear a second round of cross examination. As regards the danger of the petitioner's witnesses being put under some sort of pressure to change their testimonies, I take into account the submission of Mr. Fernandez that such a possibility could arise in any trial and should not be regarded as peculiar to this case only.

(b) The nature of the allegations in this petition and how they stand to be proved or disproved. The petition is founded on allegations of general bribery, treating, general intimidation and other acts of misconduct identified in the petition. These allegations are all denied by the respondents and it is only to be expected that the respondents will call their own witnesses to support such denial. In these circumstances, there is bound to arise a serious conflict in the evidence presented to the court. This is not a case therefore where the court can arrive at a decision by merely looking at documents or interpreting a statute. Rather, this is a case which will be decided, to a large extent, by the court upon the oral testimony of witnesses called by both sides to prove and disprove the allegations made in the petition. It is a case in which the appreciation and evaluation of witness evidence will be a crucial factor. But, to be able to properly appreciate and evaluate a witness' evidence, the judge hearing the case must have the benefit of hearing, seeing and observing the witness as he is giving that evidence, including his demeanour when giving his evidence-in-chief and under cross examination. I will be deprived of the most important means of arriving at a just decision in this case if I were to continue the case from where it was left by the previous judge. Likewise, if I were to continue the case from where it was left, I will not be in a position to compare the evidence of the petitioner and his witnesses, which I have not heard, with that of the respondents and their witnesses.

(c) That the petitioner himself has acknowledged the fact that a new judge would not be able to appreciate and evaluate the substantial conflict of evidence given on behalf of the petitioner and the respondents unless the new judge has heard that evidence himself. This is to be gathered from the letters written on behalf of the petitioner in his efforts to have the previous judge continue this case.

(d) That the petitioner also acknowledges that the notes of proceedings recorded by the previous judge were not verbatim and therefore there is a danger in acting only on what has been recorded in the notes of proceedings. Again, this is to be gathered from the letters written on behalf of the petitioner in seeking the previous judge's continuance of this case.

(e) In so far as it is suggested by the petitioner that I should continue to hear this petition from where the previous judge had left it because that was the intention of the Honourable Chief Judge Malaya, I regret that counsel for the petitioner has chosen to misread the letter of the Honourable Chief Judge. The petitioner knows that in his letter of representation to the Honourable Chief Judge Malaya, he had insisted that a new judge could only take over a case from another judge with the consent of the parties to the proceedings, and in support had cited O. 35 r. 11 Rules of the High Court. It was in reply to the stand taken by the petitioner that the Honourable Chief Judge had pointed out that I was free to proceed in accordance with the provisions of s. 18(2)(a) CJA and that to do so I did not need the consent of any of the parties to this petition.

A weighing of the matters mentioned above shows that the factors calling for discretion to be exercised in favour of a '*de novo*' hearing of this petition far outweigh those calling for the case to be continued from where the previous judge left it. I accordingly order that this election petition will be heard '*de novo*' by recalling the petitioner's witnesses and recommencing this trial.

(2) Whether The Respondents Should Be Allowed To Re-submit On Their Preliminary Objections And Motions?

Having given careful consideration to the submissions of counsel and the authorities that have been cited to me by both parties, I find that the respondents should not be allowed to do so and I say so for the following reasons:

Firstly, while I accept the principle of law laid down in *Arnold*'s case, I find that it has no application to the facts of this case. In *Arnold*'s case, the special circumstances shown was that the very issue that had been decided earlier was shown to be wrongly decided by new developments in the law relating to that issue and therefore it was only just that the parties should be allowed to reopen the issue in subsequent proceedings between the same parties. In our case, the new development in the law relating to election petitions which was made in *Dr. Lee Chong Meng*'s case was that the Election Commission and its officers are not proper parties to an election petition. However, that issue was not raised as one

of the preliminary objections or in the motion filed by the 1st, 2nd and 3rd respondents and heard by the previous judge. It cannot be said therefore that an issue that had already been decided between the 1st, 2nd and 3rd respondents has now been shown to be wrong by the new development in law on the same issue made in *Dr. Lee Chong Meng*'s case.

Secondly, it has been accepted, on the authority of the highest court in our land, that a fundamental feature of election law is that the decision of an election judge, whether made at the conclusion of a trial or on an interlocutory application, is final and cannot be appealed against. See the Federal Court's decision in *Tengku Abdullah v. Ali Amberan* [1971] 1 MLJ 25 and *Wee Choo Keong v. Lee Chong Meng & Anor.* [1996] 3 CLJ 508; and see ss. 36 and 33(4) of the Election Offences Act 1954.

The philosophy behind this feature was explained by Lord UpJohn in the case of *Devan Nair v. Yong Kuan Teik* [1967] 1 MLJ 261. He explained that it was essential that any question relating to a contested election "should be determined as quickly as possible, so that the assembly itself and the electors of the representatives thereto should know their rights at the earliest possible moment." It would run counter to that philosophy and indeed, render nugatory the statutory provisions pronouncing the finality of an election judge's decision if I were to allow the respondents to reopen the issues upon which a decision had already been made by the previous judge. To do so would also mean that the respondents would achieve in an indirect way what s. 36 and s. 33(4) prohibits, in that, whilst the respondents cannot appeal against the decision of the previous judge, they nevertheless get to review his decision by being allowed to reopen those issues before me.

Thirdly, if the previous election judge had continued to hear this petition, the respondents would be precluded from reopening the issues raised in their preliminary objections and motions because of the finality of his decision. I do not see how the appointment of a new judge to hear this petition can somehow render a decision that was final and binding on the respondents, suddenly not final and binding.

Fourthly, I regret that I cannot agree with the submission that the previous judge had made a decision on a matter over which he had no jurisdiction or that such a decision was made contrary to a provision of law, when he dismissed the respondents' complaint that a challenge to an electoral roll cannot be raised in an election petition. Counsel for the respondents has referred to the provisions of reg. 14 of the Election (Conduct of Elections) Regulations 1981 as the provision of law prohibiting an election judge from making the decision which the previous judge made. With respect, while

I agree that the relevant provisions of the Election (Conduct of Elections) Regulations set out rather comprehensive procedures to regulate the registration of electors in order to determine the eligibility and validity of voters' names registered in an electoral roll of any constituency, I cannot find in any of the regulations any express provisions prohibiting an election judge from considering a complaint relating to an electoral roll raised in an election petition. However, whether or not an election judge wishes to entertain such a complaint or act on it is an entirely different matter. The learned election judges in the cases of *Tengku Nawawi bin Tengku Abd. Kadir @ Tengku Putra v. Lokeman bin Musa & 2 Ors.* [1996] 1 CLJ 551; *Datuk Joseph Pairin Kitingan v. Datuk Harris Salleh & 5 Ors*. (K507/84 – unreported) and *Wong Phin Chung v. The Election Commission* (K1 of 1994 – unreported) had all decided that a complaint relating to an electoral roll cannot be raised in an election petition because that was a conclusion they arrived at after interpreting the relevant regulations they were considering – not because they were giving effect to any prohibition found in those regulations. With regard to the case of *Badiaddin* which was relied upon by counsel for the respondents, I find that what was said there cannot apply to the facts of our case because there is no provision of law prohibiting what the previous judge had decided on, unlike the situation in *Badiaddin*'s case where there were express provisions of law concerning how Malay reserve land may be dealt with.

Fifthly, I regret that I cannot agree with the submission that because one election judge is not bound by the decision of another election judge, I should not feel bound by the previous judge's decision and so allow the respondents to reopen the issues. That submission overlooks the fact that I have been appointed to continue with the hearing of the very same petition that the previous judge was unable to complete. In such a situation, the doctrine of *res judicata* would prevent the respondents from re-agitating the very same issues which had already been decided earlier.

(3) Whether The 1st, 2nd And 3rd Responuents Can Raise A Fresh Preliminary Objection Questioning Their Being Made Parties To This Petition?

In my judgment, the 1st, 2nd and 3rd respondents are not prevented from doing so. None of the impediments discussed above which prevents the respondents from reopening the issues already decided upon will operate to prevent the 1st, 2nd and 3rd respondents from raising this new preliminary objection. The petitioner's objection that the decision of Augustine Paul J in *Dr. Lee Chong Meng*'s case does not constitute a new development in the law and so should be ignored is an argument that really

goes towards the merits of the fresh preliminary objection sought to be raised and should only be considered at the appropriate time. For present purposes, I am more guided by the fact that in civil proceedings, the court may at any stage of the proceedings order that a party to the proceedings be removed or that a new party be added. I see no good reason why that same power cannot be exercised by an election judge. I accordingly order that the 1st, 2nd and 3rd respondents are at liberty to raise the fresh preliminary objection they wish to and that I will hear submissions on the matter.